

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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HECTOR L. GARCIA,	: <b>ECF CASE</b>
	:
Plaintiff,	:
	: Civil Action No. 09-cv-04599
-against-	: (BSJ)(RLE)
	:
NEWMARK KNIGHT FRANK And 641	: <b>NOTICE OF MOTION</b>
OWNER, LLC,	:
	:
Defendants.	:
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PLEASE TAKE NOTICE that upon the Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint, or in the Alternative, Compel Arbitration; the Affirmation of Robert A. Sparer and the exhibits attached thereto and all prior pleadings had herein, Defendants Newmark & Company Real Estate, Inc. d/b/a Newmark Knight Frank s/h/a Newmark Knight Frank ("Newmark") and 641 Owner, LLC ("641 Owner" and collectively with Newmark, "Defendants") will move this Court, before the Honorable Barbara S. Jones, at the Daniel Patrick Moynihan United State Courthouse, 500 Pearl Street, New York, New York 10017, on a date and time to be designated by the Court, for an Order and Judgment:

- (1) dismissing Plaintiff Hector L. Garcia's ("Plaintiff") Complaint in its entirety pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction;
- (2) dismissing the following of Plaintiff's claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure:
  - (a) Counts Eight, Nine and Eleven alleging retaliation in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination in Employment Act ("ADEA") and the New York State Human Rights Law ("NYSHRL") for having allegedly opposed age, race and/or national origin discrimination because Plaintiff has failed to state a cause of action;
  - (b) Count Seven alleging retaliation in violation of the Family and Medical Leave Act ("FMLA") for failure to state a cause of action; and

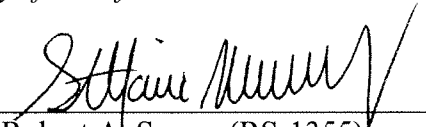
- (c) Counts Eight, Nine and Ten alleging retaliation in violation of the Americans With Disabilities Act ("ADA"), Title VII and the ADEA because Plaintiff has failed to exhaust his administrative remedies;
- (3) dismissing the following of Plaintiff's claims against 641 Owner:
  - (a) Counts One, Three, Five, Eight, Nine and Ten alleging discrimination and retaliation on the basis of disability, race, national origin and age in violation of the ADA, Title VII and the ADEA because Plaintiff failed to exhaust his administrative remedies; and
  - (b) Count Twelve because Workers' Compensation Law is the exclusive remedy for Plaintiff's negligent supervision claim and the negligent supervision claim is preempted by Section 301 of the LMRA;
- (4) dismissing Plaintiff's disability and retaliation claims as an arbitration award that determined that Plaintiff is physically unable to perform his job has preclusive effect;
- (5) in the alternative to dismissal, remanding Plaintiff's claims to the arbitrator and directing Plaintiff to arbitrate his claims pursuant to the Federal Arbitration Act (9 U.S.C. §§ 3 and 4); and
- (6) granting such other and further relief as the Court may deem just and proper.

Dated: September 8, 2009  
New York, New York

Respectfully submitted,

CLIFTON BUDD & DeMARIA, LLP  
*Attorneys for Defendants*

By: \_\_\_\_\_

  
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